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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6568

JOHNNIE B. HANKERSON,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

the size, age and strength of the defendant as compared to Gregory Ashe, the fierceness of the assault, if any, upon the defendant, whether or not Gregory Ashe had a weapon in his possession. And the third thing the defendant must satisfy you of is that he was not the aggressor. If he voluntarily and without provocation entered into a fight with Gregory Ashe, he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to Gregory Ashe that he was doing so. One enters a fight voluntarily if he uses towards his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And the fourth thing that the defendant must satisfy you of is that he did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

In this case the defendant has introduced evidence that he is a man of good character and reputation. I won't recount all of that again for you but you will recall the witnesses who testified that the defendant was a man of good character and reputation. I want to charge you that you can consider this evidence in two ways, or you may consider it for two purposes. First, if you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts or circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And secondly, you may consider this evidence, although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as you decide it should receive in connection with all of the other evidence. There is also some evidence in this case, and I won't recount all of that again for you, that the defendant some years ago has pled guilty to some other crimes. He testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for.

I want to charge you that you may consider that evidence in one way only and that is considering the nature of the crimes which the defendant testified he had been convicted of or pled guilty to, if you think that that bears upon his truthfulness then you may take that into account in deciding whether you believe or disbelieve him as a witness. But you may not consider that evidence in determining the guilt of the defendant in this case; that is, do not find him guilty in this case because he has pled guilty to another crime or been found guilty of another crime at another time.

The State contends that the defendant ran from the scene that night or drove away from the scene that night and did not return, did not report it to the police, and the State contends that that is evidence of flight by the defendant. Evidence of flight, if you believe that evidence, may be considered by you together with all other facts and circumstances in this case in determing whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt. So if you believe the evidence of flight, I want to instruct you not to find the defendant guilty on that evidence alone; you will have to consider that together with all other evidence in the case in determining whether the State has satisfied you beyond a reasonable doubt that the defendant is guilty of either of the two crimes of which you may find him guilty, if you do not find him not guilty.

COURT: Is there anything else you want charged, Mr. Rosser?
MR. ROSSER: No, sir.

So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.

If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or

used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty.

I will let you retire in just a moment. I suggest that when you do retire you appoint one of your members a foreman so that he or she could poll you in the jury room and speak for you when you return.

You will have to reach a unanimous verdict before you can find the defendant either guilty of second degree murder or manslaughter or not guilty.

If you want any further instructions, you are entitled to have them. However, you will all have to come back to the courtroom to get them; you can't send one person back to get them for you and you can't get the deputy sheriff to get them for you.

So at this time I instruct you, Ladies and Gentlemen, to retire to your room and render a true and just verdict.

(JURY RETIRES AT 3:43 O'CLOCK P.M.)

(JURY RETURNS TO THE COURTROOM FOR FURTHER INSTRUCTIONS AT 4:32 O'CLOCK P.M. AND THE FOLLOWING PROCEEDINGS ARE HAD.)

CLERK: Ladies and Gentlemen of the Jury, have you agreed upon your verdict?

JURY FOREMAN: No. We would like to have the Judge to clarify again the difference between manslaughter and second degree murder.

COURT: All right. Excuse me. I thought you had reached a verdict. Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one. I explained to you a little bit more maybe than you asked, but I thought you needed that clarified, perhaps. Is that enough explanation or would you like further explanation? Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure

that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice.

Unless you want further instructions, I will let you retire and resume your deliberations. If you want any further instructions, don't hesitate to come out and ask for them."

ARGUMENT

I

(A) NORETROACTIVITY

(1) In General

The Petitioner argues, in substence, in Sections I and II of his petition that the Supreme Court of North Carolina, by declining to give this Court's decision in Mullaney v. Wilber, 421 U.S. 684 (1975), retroactive effect was in error. He argues that the Mullaney rule as to the burden of proof in criminal trials affects the reliability of the fact finding process to such an extent that general retroactive application of the rule is required. Finally, as an absolute minimum, he contends the rule should be given limited retroactivily to his case since it was currently pending on direct appellate review at the time Mullaney was announced and that the reviewing Court failed to consider this alternative.

The problem of whether to apply a "new" doctrine of constitutional law retroactively or prospectively has been the subject of intense debate, over the past eleven years, since the decision in Linkletter v. Walker, 381 U.S. 618 (1965).

In this interval, some twenty-three cases have announced "new" constitutional doctrines to be applied in criminal prosecutions and approximately one-half (twelve) of these "new" doctrines have, in subsequent cases, been held to be fully retroactive. Full retroactivity has been given in the following cases:

Griffin v. Illinois, 351 U.S. 12 (1956), right of indigent defendant to transcript on appeal;

Hamilton v. Alabama, 368 U.S. 52 (1961), right to counsel at arraignment plea;

Douglas v. California, 372 U.S. 353 (1963), right to assistance of counsel on appeal;

Gideon v. Wainwright, 372 U.S. 335 (1963), right to assistance of counsel at Felony trial;

White v. Maryland, 373 U.S. 59 (1963), prohibition of guilty plea taken without assistance of counsel;

Jackson v. Denno, 378 U.S. 368 (1964), procedure to determine voluntary confession;

Mempa v. Rhay, 389 U.S. 128 (1967), right to counsel at probation hearing;

Barber v. Page, 390 U.S. 719 (1968), right to confrontation during trial;

Bruton v. United States, 391 U.S. 123 (1968), prohibition of use of confession by codefendant implicating defendant;

Witherspoon v. Illinois, 391 U.S. 510 (1968), disqualification of death penalty inclined jurors;

In Re Winship , 397 U.S. 358 (1970), burden of proof beyond a reasonable doubt required in juvenile proceeding where accused would essentially be convicted of a crime and Waller v. Florida, 397 U.S. 387 (1970), double jeopardy applies in State and municipal prosecution on same act or offense. New doctrines which have been held to be nonretroactive;

Map v. Ohio, 367 U.S. 643 (1961), limitations on use of illegally obtained evidence;

Escobedo v. Illinois, 378 U.S. 478 (1964), right to counsel at police interrogation before trial;

Griffin v. California, 380 U.S. 609 (1965), prosecution's comment on defendant's failure to testify;

Miranda v. Arizona, 384 U.S. 436 (1966), right to be warned by interrogating police officers prior to trial;

United States v. Wade, 388 U.S. 218 (1967), right to counsel at pretrial lineups;

Katz v. United States, 389 U.S. 347 (1967), electronic eavesdropping;

Duncan v. Louisiana, 391 U.S. 145 (1968), right to jury trial;

Lee v. Florida, 392 U.S. 378 (1968), use of wiretap evidence at trial;

Boykin v. Alabama, 395 U.S. 238 (1969), form of guilty plea;

Chimel v. California, 395 U.S. 752 (1969), scope of search incident to lawful arrest and Coleman v. Alabama, 399 U.S. 1 (1970), right to counsel at preliminary hearing.

It would appear that most, if not all, of the decisions held to be retroactive involved new doctrines which would, it was believed, correct difficiencies in the fact finding procedure in use prior thereto. On the other hand, new constitutional doctrines designed to deter interlorrable police conduct (illegal search, seizures and unreasonable or appressive investigatory techniques) or to guarantee early appointment of counsel or limit to the scope of jury arguments have been held to be nonretroactive.

In all of the cases, as put by one writer:

> "...the Supreme Court has indicated that the following are the criteria for determining the retroactivity of its new rules: (1) the purpose to be served by the particular new rule; (2) the extent of reliance which had been placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule."

Annotation, 22 L. Ed. 2d 821, 832 (1970). The decided cases support this statement. Tehan v. United States , 382 U.S. 406 (1966), reh. den. 383 U.S. 931 (1966); Stovall v. Denno, 388 U.S. 293 (1967); De Stefano v. Woods, 392 U.S. 631 (1968), reh. den. 393 U.S. 898 (1968); Desist v. United States, 394 U.S. 244 (1969), reh. den. 395 U.S. 931 (1969); Halliday v. United States, 394 U.S. 831 (1969); Williams v. United States, 401 U.S. 646 (1971); Adams v. Illinois, 405 U.S. 278 (1972) and Ivan V. v. City of New York, 407 U.S. 203 (1972). In its opinion, the Supreme Court of North Carolina recognized this when it noted:

> "In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the new rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect. (Citations omitted.)
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> ***
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> "If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions...even though the new rule may have been 'foreshadowed' by

> intervening cases...and the effect on the administration of justice of retroactive application...not only in the nation but (sic) as a whole but within the particular jurisdiction affected." 288 N.C. at pages 652 and 653.

The State of North Carolina submits that the decision of its Supreme Court was entirely consistent with the tests as set forth above and, accordingly, no error in this aspect of its opinion appears. An in depth analysis and argument relating to these three factors, as they apply to the North Carolina rules in general and this case in particular, follows.

(2) The "Purpose" Factor

As both this court and the North Carolina Supreme Court have recognized, the purpose of a rule which is deemed to improve the reliability of the fact finding process will be given the greatest weight in the retroactivity consideration. When it is concluded a new doctrine will improve the fact finding process, it will be given retroactive effect because it may disclose that an otherwise innocent person was convicted in the past because the fact finding process was unreliable.

It is submitted that the rules of law as to the burden of proof as they existed in North Carolina prior to this case did not affect the reliability of the fact finding process to such an extent as to require the retroactive application of Mullaney.

The record in this case shows the trial court instructed the jury in pertinent part, as follows:

> "Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed to be innocent, and the burden of proof is on the State to prove beyond a reasonable doubt that he is guilty before you can find him guilty.
>
> "When I speak of a reasonable doubt I don't mean a vain, a fanciful or an imaginary doubt, but I do mean a sane or a rational doubt . . . . (I)f you have any doubt based on reason and common sense, arising out of some or all the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute the guilt of the defendant, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and find him not guilty.
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> ***
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> "I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt, first, that the defendant intentionally and without justification or excuse and with malice shot Gregory Ashe with a deadly weapon. Malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it always (also) means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification. A pistol, a .38 caliber pistol, a pistol would be a deadly weapon. The second thing the State must prove and prove to you beyond a reasonable doubt is that the shooting was the proximate cause of Gregory Ashe's death . . . .
>
> "If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder . . . .
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. And I will charge you on self-defense in just a moment. But I do want to charge you that to negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things: first, that he shot Gregory Ashe in the heat of a passion . . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation . . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.
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> "To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things: first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm . . . . The second thing that you must be satisfied of--excuse me--that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness . . . . And the third thing the defendant must satisfy you of is that he was not the aggressor . . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force . . . .

"If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

***

"So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.

"If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Handerson, intentionally shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty." (Emphasis supplied.)

After the jury retired and came back for reinstruction the judge told them:

> "Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one . . . .
>
> Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound

> with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice." (Emphases supplied.)

The question then becomes did these instructions, by telling the jury that it must be satisfied that the petitioner acted in the heat of passion on sudden provocation or in self-defense, impermissibly relieve the prosecution of its burden of proving malice and unlawfulness and place this burden of persuasion as to the non existence of these elements on the petitioner so as to substantially impair the fact finding process. To resolve this question, an examination of what is meant by telling the jury, in accordance with the long settled North Carolina rule, that it must be satisfied is required.

This language as used in the instructions given here does not mean the jury must be persuaded by a preponderance of the evidence that malice does not exist, that the heat of passion on sudden provocation does exist, or that the elements of self-defense do exist. The Maine jury instructions found wanting in Mullaney clearly placed upon the defendant the burden to show that it is more probable than not, or by a fair preponderance of the evidence, that the defendant killed in the heat of a sudden passion. Maine followed the landmark case of Commonwealth v. York, 9 Met (50 Mass.) 93 (1845). This Court seems to have regarded this aspect of the Maine jury instruction as being primarily offensive when it observed:

> "Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result . . . ." Mullaney v. Wilbur, supra at 703.

The North Carolina burden of proof on a defendant to show heat of passion or self-defense is decidedly and purposely different in that the quantum of proof is simply to the "satisfaction" of the jury--not by the greater weight of the evidence nor beyond a reasonable doubt. State v. Freeman, 275 N.C. 662, 170 S.E. 2d 461 (1969). This standard was not invented by North Carolina. It was standard recognized by expositors of the common law:

> "(W)e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly

lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury (Emphasis supplied): the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 W. Blackstone Commentaries *201. Excerpts cited in Mullaney v. Wilbur, supra at 693.

But see Woolmington v. Dir. of Public Prosecutions, 1935 Ap. Cas. 462, cited in Mullaney v. Wilbur, supra at n. 22.

As noted in Mullaney,

"In a landmark case, Commonwealth v. York, 9 Met (50 Mass) 93 (1845) Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion." 421 U.S. at 694.

This Court rejected York's rule for use in federal courts in Davis v. United States, 160 U.S. 469 (1895), giving this reason:

"We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the insanity of the accused at the time of the killing." 160 U.S. at 484. (Emphasis supplied.)

This was precisely the reason given 80 years later in Mullaney.

North Carolina has never followed York; rather, proceeding along the lines of the dissent in York and the later case of Commonwealth v. Hawkins, 3 Gray (69 Mass.) 463 (1855). In State v. Ellick, 60 N.C. 450 (1864) it was held that a defendant need not make out his affirmative defense or matters in mitigation beyond a reasonable doubt but simply to the satisfaction of the jury. In State v. Willis, 63 N.C. 26 (1868) the North Carolina Court considered York and explicitly rejected that portion of the York opinion which placed the burden on the defendant to make out his affirmative defense or matters in mitigation by a preponderance of the evidence, noting:

"We prefer to stand super antiquas vias, and to adhere to the rules laid down in the State v. Ellick, above referred to. In that case the erroneous statement which we had inadvertently made in the State v. Peter Johnson, (48 N.C. 266 (1855)) that it was incumbent on the prisoner to establish the matters of excuse or extenuation

beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in Commonwealth v. York, that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." 63 N.C. at 29.

Although there has been language in several of the later North Carolina cases to the contrary, Stansbury's North Carolina Evidence § 214, n. 48 (Brandis Rev. 1973), e.g., State v. Freeman, supra, it has held that the burden on the defendant is not by the preponderance of the evidence, State v. Barrett, 132 N.C. 1005, 43 S.E. 832 (1903), nor any greater standard, State v. Freeman, supra. State v. Carland, 90 N.C. 668 (1884), holding to the contrary, erroneously purported to follow Willis and was overruled sub silentio in State v. Barrett, supra.

In Barrett the judge's instruction on burden of proof was basically that used in Maine. Although reversing for other errors, this aspect of the charge was strongly criticized as not in accord with prior cases, the court saying:

"(T)he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

"Satisfying" the jury of the existence of certain facts therefore does not mean that defendant must prove their existence by a preponderance of the evidence.

Accordingly, the crucial difference between the jury instructions given here and those given in Maine which were struck down in Mullaney are: upon proof beyond a reasonable doubt of an assault with a deadly weapon resulting in death, and the unlawfulness of the killing, and evidence of all elements of heat of passion on sudden provocation a jury under the Maine instructions would be required to return a verdict of guilty of murder unless it could find affirmatively by a preponderance of the evidence that the killing was done in the heat of passion on sudden provocation; whereas under the approved instructions in North Carolina even if no such affirmative finding was made the jury could not return a verdict of guilty of murder in the second degree unless the State, aided by the inference of malice arising from the use of a deadly weapon, proved malice

beyond a reasonable doubt. Thus it can be concluded that the defendant's burdern to "satisfy" the jury of the existence of heat of passion taken in the context of the entire instruction means only that the evidence of heat of passion on sudden provocation must be sufficient to raise a reasonable doubt in the minds of the jury as to the existence of malice. This conclusion is required in order to give appropriate effect to those portions of the instructions which unequivocally and repeatedly place upon the State the burden to prove malice beyond a reasonable doubt. Likewise inasmuch as the State here was required to prove the absence of justification or excuse, i.e., unlawfulness beyond a reasonable doubt, the defendant's burden to "satisfy" the jury of the existence of self-defense means only that the evidence of self-defense must be sufficient to raise a reasonable doubt as to the existence of unlawfulness.

While the terminology of these instructions as interpreted above may allocate some burden of persuasion to defendant it does not follow that the allocated burden is therefore constitutionally impermissible. This Court recognized in Mullaney v. Wilbur, supra, n. 20, that the North Carolina rules have "blurred the distinction between" the production burden and the persuasion burden. Any so called blurring does not arise from failure to recognize the difference between producing evidence and persuading the jury but rather from the constitutional insignificance of the distinction between requiring a defendant to produce evidence which is capable of belief by a jury and which tends toward innocence or mitigation (tacitly approved in Mullaney), and requiring him to persuade a jury that there is a "doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute (his) guilt."

While there may be words in the instruction such as "if you find that the defendant acted . . . in self-defense, he would not be guilty" and "the defendant must satisfy you" which, isolated, might seem to place some burden of proving affirmatively the presence of self-defense or heat of passion, when placed in contex of other pertinent provisions of the instructions, they do not. See Cupp v. Naughten, 414 U.S. 141 (1973). Cupp arose from an Oregon criminal

prosecution in which the defendant put on no evidence. Twice the court charged that the defendant was presumed innocent until proven guilty beyond a reasonable doubt. The judge also charged on an Oregon permissive inference that witnesses were presumed to speak the truth. Defendant claimed this latter instruction impinged unconstitutionally on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. In rejecting the claim this Court said:

> "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from Winship." Id. at 148-149.

So in this case, even if those challenged portions of the instruction, in isolation, may "as a matter of abstract logic . . . impinge on the right of the defendant to have his guilt proved beyond a reasonable doubt," taken in context of the full charge they are designed simply, and constitutionally, to guide the jury in evaluating whether the State has proven guilt beyond a reasonable doubt.

Not only do these instructions comport with the Due Process Clause of the Fourteenth Amendment, they also enunciate principles that are supported by compelling policy considerations. The reasonable doubt standard in criminal cases is erected in favor of the life and liberty of innocent defendants. To place no burden on a criminal defendant charged with homicide to raise even a reasonable doubt as to the existence of malice or unlawfulness upon proof that he intentionally shot another person which shooting proximately resulted in that person's death would be to favor death to the victim

and injustice to the State. This is so because a homicide victim can never himself shed light on the circumstances surrounding the killing. One can think of no rule which would more inevitably lead to undersirable results than one which requires instructing a jury that it must acquit a homicide defendant who produces some evidence of mitigation or justification whether or not that evidence is enough or "satisfies" it that there is a reasonable doubt as to malice or unlawfulness. Giving the defendant the burden of raising a reasonable doubt is an approved rule in a number of jurisdictions. DeGrott v. United States, 78 F2d, 244, 251 (9th Cir. 1935) (synthesizing Davis v. United States, supra, and Matheson v. United States, 227 U.S. 540 (1913)); Spence v. Territory, 13 Ariz. 20, 108 P. 227 (1910); Everett v. State, 88 Ariz 293, 356 P. 2d 394 (1960); State v. Dill, 282 S.W. 2d 456 (Mo. 1955); State v. Harrison, 81 N.M. 623, 471 P. 2d 193 (Ct. App. 1970); State v. Hazlet, 16 N.D. 426, 113 N.W. 374 (1907); see annot., 43 A.L.R. 3d 221 (1972), especially §§ 3(f) and 4(b).

Assuming the above analysis is correct, then there has been no undue impairment of the reliability of the fact finding process in North Carolina. Juries have always been told the burden is on the State to prove every element of the crime beyond a reasonable doubt and the State has always carried this burden in every case where conviction has resulted. The finder of fact has had only one standard to apply; namely, proof beyond a reasonable doubt. This situation is clearly different from that presented in In re Winship, supra where the fact finder (the juvenile court judge) stated that if the reasonable doubt standard applied he would acquit. The fact finder in Winship never had the beyond a reasonable doubt standard to apply to any of the elements of the alleged offense. Such is not the case here where the only standard to be applied by the fact finder was beyond a reasonable doubt and this burden was never shifted.

In summary, the State submits that when the "probabilities" of the impact of the instruction under attack are weighed on the fact finding process, which can be done under Williams v. United States, 401 U.S. 646 (1971), there is little likelihood the fact finding process in the many former trials was so unreliable as to require a retroactive

application of the Mullaney rule. This being so, the Supreme Court of North Carolina was entirely correct in refusing to apply this new doctrine retroactively.

(3) The Reliance Factor

The Respondent argues that because of the long reliance on its well-settled law the impact of an ultimate holding of retroactivity would be great indeed. Because the Supreme Court of North Carolina fully developed the long history of its doctrine of proof to the satisfaction of the jury in its opinion, see 288 N.C. pages 644 through 648, this excellent account will not be repeated here except to emphasize, as noted in the "Purpose" argument proceeding, that this doctrine had its origins in the common law before North Carolina even became a State. Moreover, the North Carolina Supreme Court as to self defense has never taken the position of Deleware, Maryland, Ohio, Pennsylvania, Rhode Island, Maine and West Virginia which require proof by a preponderance of the evidence, or South Carolina which requires proof by the greater weight of the evidence, or Kentucky which requires proof by convincing evidence. Annotation, 43 A.L.R. 3rd 221 (1972). It appears that Georgia was the only other state with a standard similar to North Carolina. See, e.g., Mullis v. State, 196 Ga. 569, 27 S.E. 2d 91 (1943). Aside from North Carolina the retroactive impact of this new doctrine on other states would be as great, or perhaps greater than, on North Carolina. For example, Maryland has already held it applicable to its law which was similar to Maine's in Evans v. State, 28 Md. App. 640, 349 A. 2d 300 (1975). Maryland has further held Mullaney to be completely retroactive but, as noted hereafter, its court feels complete retroactivity will have only a limited effect in overturning prior convictions. New York, while holding complete retroactivity also, has nevertheless found its law to be in harmony with the new standards and, consequently, expects no upsetting of its prior convictions. People v. Patterson, 19 Crim. Law Rptr. 1001 (N.Y. April 1, 1976). Deleware has declined to apply the rule retroactively but, on a prospective basis, did require changes in some of its law. Fuentes v. State, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975). So far, the lower federal courts have also split on the question. See

Hallowell v. Keve, 19 Crim. Law Rptr. 2145 (U.S. Dist. Del. April 22, 1976); Castro v. Regan, 18 Crim Law. Rptr. 224 (3rd Cir.) None of these cases, however, settle the question because only this court can make an authoritative determination as to retroactivity.

Before noting the specific impact on North Carolina, it should be noted there was no "foreshadowing" of the Mullaney doctrine in any prior decisions so as to weaken the reliance on past rules. As noted previously In re Winship, supra and Ivan V. v. City of New York, supra, merely applied the long standing rules of proof of guilt beyond a reasonable doubt to juvenile proceedings where a finding of delinquency was based on proof of a crime. Winship merely said that to convict a juvenile of what would otherwise be a crime, evidence beyond a reasonable doubt would be required rather than proof by a mere preponderence of the evidence. In neither of these cases, both of which involved juvenile proceedings in New York, was the issue of either mitigation or self-defense present. (Although this court rejected this type of distinction by petitioner in his argument that Winship did not control. Mullaney v. Wilbur, supra at page 697. Thus, if Mullaney is merely retroactive extension of Winship, then Winship did "foreshadow" the new rules.) However, as best the Respondent can glean from Mullaney, such was not the case.

The decisions of the lower Federal Courts in the protracted litigation involving Mr. Wilbur did not "foreshadow" the result ultimately reached in his case. Thus, in the first two cases in the Federal District Court and the Court of Appeals for the First Circuit, Wilbur v. Robbins, 349 F. Supp. 149 (1972) and Wilbur v. Mullaney, 473 F. 2d 943 (lst. Cir 1973) turned on an interpretation of Maine law and equated malice aforethought with premeditation, holding Winship to require the prosecution to prove this fact beyond a reasonable doubt. This had always been the law in North Carolina as shown by the analysis in the "Purpose" section of this brief and as further elaborated in the Presumption section ante. After a reintrepretation of the Maine law in State v. Lafferty, 309 A. 2d 647 (1973), this court directed the First Circuit to reconsider its ruling. Mullaney v. Wilbur, 414 U.S. 1139 (1974). In its reconsideration, the Court of Appeals for the First Circuit held the principles of Winship applied and that to establish murder

the prosecution must prove beyond a reasonable doubt that the defendant did not act in the heat of passion. Wilbur v. Mullaney, 496 F. 2d 1303 (1974). Thus, until late 1974, never had any Federal court decision "foreshadowed" this new doctrine. Several other cases of this Court had considered the problem in the context of Federal law, Davis v. United States, supra, but refused to apply the doctrine to the States. Leland v. Oregon, 343 U.S. 790 (1952).

Almost from the time it became a State and certainly for over one hundred years the instructions under attack were regarded as correct by all who administered criminal justice in North Carolina. To change these rules retroactively would destroy the justified reliance on the heretofore settled and unquestioned law with the consequent great impact noted below.

(4) The Impact Factor

In addition to the impact of a decision which would retroactively nullify over one hundred years of settled law in North Carolina and number of other States, the reliance by North Carolina on its longstanding rules has been equally great. It cannot be denied that retroactive application of this new doctrine both to North Carolina and the other States will result in literally thousands of State post conviction hearings or Federal haebus corpus hearings.

In North Carolina alone, as noted by the Supreme Court of North Carolina in its opinion, there are around one thousand individuals currently incarcerated in the prison system whose trials might be erroneous if the Mullaney doctrine is applied retroactively. 288 N.C. at page 654. (The Maryland Court in Evans v. State, supra, in an exhaustive analysis, says that ultimately only a few convictions will be overturned because of the limited number of cases where a Mullaney error will be found to be prejudical. This overlooks the simple fact that virtually every prisoner convicted of homicide will want his trial reexamined, a tremendous undertaking!) To relitigate these stale convictions, with the burden and expense of locating the records of the proceedings (if, indeed, records of the older trials even exist), would be an extremely expensive process. An inordinate amount of prosecutorial and judicial time would be spent on litigation all believed had long since ended. Surely this time, money

and energy would be better spent dealing with today's crowded dockets and rising criminalty rather than on a rehashing of trials long thought to be in a state of repose.

No civilized government wants a system of criminal justice which convicts the innocent. North Carolina submits that its system of criminal justice and the trials conducted thereunder produced results which were as reliable as any. Because of the years of reliance upon these rules by the people who enforce, administer and apply the rules of law formulated, these rules, as they existed prior to June 9, 1975, should be allowed to stand. Any other result, the Respondent submits, would create chaos and havoc unwarranted by the benefits sought to be obtained. The duty of the Courts, the Respondent argues, is to end litigation; retroactivity would create litigation which is an undesirable result.

(5) Limited Retroactivity

The petitioner's argument for limited retroactivity as to him because his case was still on direct review is not well taken. The petitioner relies heavily on Linkletter v. Walker, 381 U.S. 618 (1965) and United States v. Schooner Peggy, 1 Cranch 103 (1801) and asserts the Supreme Court of North Carolina did not consider this alternative in its opinion.

The opinion of the Supreme Court of North Carolina refutes this assertion. In 288 N.C. at page 652, the opinion noted:

> "This case was tried November 21, 1974; Mullaney was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we be not required to apply its principles to the case now before us, Kaiser v. New York, 394 U.S. 280 (1969); Desist v. United States; 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so." (Emphasis added.)

Earlier, it is opinion, the court was careful to note:

> "We decline, however, for reasons hereinafter stated, to give Mullaney retroactive effect in North Carolina. We hold that

> because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the Mullaney decision, the defendant is not entitled to the benefit of the Mullaney doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975." 288 N.C. at page 643.

Accordingly, this alternative was considered and rejected by the Court.

Moreover, the later cases of this Court have firmly rejected any notions of limited retroactivity considered in Linkletter and Schooner Peggy. Johnson v. New Jersey, 384 U.S. 719 (1966). In appropriate cases, new rules have been applied in an entirely prospective manner even in the case where they were announced. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); James v. United States, 366 U.S. 213 (1961). Johnson, supra, by its very terms limited the rules announced in Escobedo v. Illinois, supra, and Miranda v. Arizona, supra, to trials began after the date of these decisions and cut off application of these rules to any cases still on direct appeal. Based on these cases, therefore, the Supreme Court of North Carolina was entirely correct as to this aspect of the case. Obviously, if it should later be determined the decision is fully retroactive, then this conclusion would be incorrect for that it is premised on an ultimate determination of nonretroactivity; it was on this premise, of course, that the North Carolina Court based its determination. Nothing to date, however, compels the result argued for by the petitioner in this aspect of his petition.

(B) EVIDENTARY PRESUMPTIONS (INFERENCES)

Petitioner asserts that he was denied due process of law by the instruction that the law raises presumptions of unlawfulness and malice from proof beyond a reasonable doubt of an intentional killing with a deadly weapon or of an intentional infliction of a wound with a deadly weapon proximately causing death. A similiar contention was rejected by the North Carolina Court in State v. Sparks, 285 N.C. 631, 207 S.E. 2d 712 (1974), petition for cert. filed 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Defendant contends that the intervening decision in Mullaney compels a contrary decision.

Because of the Maine law of homicide, this Court in Mullaney, was not called upon to deal with the constitutionality of evidentiary presumptions and did not do so. This law and the precise issue it presented was succinctly stated by this Court itself, relying on State v. Lafferty, 309 A2d 647 (Me. 1973), as follows:

> "Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder--i.e., by life imprisonment--unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter--i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691. (Emphasis supplied.)

To prove murder the State in Maine was required to prove only (1) that the killing was unlawful, i.e., without justification or excuse and (2) that it was intentional. Malice, or malice aforethought, was not an essential element of the crime of murder in Maine. State v. Lafferty, supra. This Court in Mullaney expressly rejected the notion held by the lower federal courts that it was. 421 U.S. at 690-691. In Maine "malice is not a designation of any subjective state of mind existing as a fact." State v. Rollins, 295 A2d 914, 920 (Me. 1972) quoted and cited with approval in Lafferty, supra, at 664. Malice, in Maine, was nothing more than "a fictional metaphysical term of art." State v. Lafferty, supra at 672 (concurring opinion). It is true that a portion of the trial judge's instructions to the jury as summarized in Mullaney were:

> "(T)hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The court emphasized that 'malice aforethought and heat of passion on sudden provocation are inconsistent things.' id. at 62; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" 421 U.S. at 686-687. (Emphasis supplied.)

As later analysis of Maine's law in Lafferty, adopted by this Court in Mullaney, makes clear, however, there was no evidentiary

presumption of malice operating in Maine. None was required. Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation meant simply that murder in Maine was an unlawful and intentional killing not done in the heat of passion where the issue of heat of passion was raised. The State, however, was not required to prove the absence of heat of passion. In this it was found that due process was wanting in the following words:

> "Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. In re Winship, 397 U.S., at 372, 90 S. Ct. at 1076 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 703.

In North Carolina, by contrast, malice signifies a significant state of mind without which there can be no murder in the second degree. The trial judge so instructed the jury here, telling them that malice meant "hatred, ill-will or spite" and "that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another . . . ." North Carolina's presumptions then of malice and unlawfulness are evidentiary presumptions. They flow from proof of certain facts regarding the manner of the killing, or how it was accomplished. The facts to be presumed, malice and unlawfulness, remain essential elements to be proved by the State. "While . . . the intentional killing of another with a deadly weapon raises two presumptions against the defendant, first, that the killing was unlawful, and second, that it was done with malice

. . . (citation omitted) this rule of law does not mean that the burden of showing an unlawful killing does not still rest with the State." State v. Carter, 254 N.C. 475, 478, 119 S.E. 2d 461 (1961); accord, State v. Johnson, 261 N.C. 727, 136 S.E. 2d 84 (1964).

A presumption of unlawfulness was, of course, not dealt with in Mullaney.

Mullaney, however, at n. 31, recognizes generally, the validity of inferences and presumptions to aid the prosecution in a criminal case so long as they meet "certain due process requirements" citing with approval Barnes v. United States, 412 U.S. 837 (1973) (knowledge that property was stolen may be inferred from unexplained possession of recently stolen property); Turner v. United States, 396 U.S. 398 (1970) reh. denied, 397 U.S. 958 (knowledge that heroin was illegally imported may be inferred from its being knowingly possessed; the same inference is not constitutionally permissible with regard to cocaine). United States v. Gainey, 380 U.S. 63 (1965) ("carrying on" illegal manufacture of whiskey may be inferred from unexplained presence at an illegal still); and Davis v. United States, supra (presumption of sanity approved as a matter of federal practice).

Unless then the presumptions of malice and unlawfulness as explained to the jury in this case have the effect of relieving the prosecution of the burden of proving an essential element of murder in the second degree where the issue of its existence is properly presented, the real evil prescribed by Mullaney, the North Carolina position in State v. Sparks, supra, that these presumptions are constitutional is correct. Accordingly, this question will be examined in the light of Mullaney.

First there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in Mullaney. There could not, consequently, be any Mullaney error prejudicial to defendant on this aspect of the case.

As a matter of State law, however, and as the jury was instructed here, North Carolina's rules allocating burden of proof on self-defense and heat of passion are the same. As early as 1868 the North Carolina court said in State v. Willis, supra at pages 29-30,

> "in the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide."

There was here evidence of self-defense. The issue regarding its existence was properly presented. Inasmuch as there were jury instructions given as if there were evidence of a heat of passion killing, this argument will treat this case as if such evidence were present.

The North Carolina presumptions as explained to the jury in this case did not relieve the State of the ultimate burden of proof as to malice and unlawfulness. The trial judge placed on the State the burden to prove defendant's guilt beyond a reasonable doubt. He told the jury that a reasonable doubt "as to any fact necessary to constitute the guilt of the defendant" would require an acquittal. In his explanation of second degree murder, he told the jury that those facts were: (1) an intentional shooting with a deadly weapon; (2) without justification or excuse; (3) with malice, and (4) proximately resulting in another's death; and he placed upon the State the burden to prove each of these facts beyond a reasonable doubt. In his final mandate to the jury, he again placed the burden on the State to prove beyond a reasonable doubt an intentional killing with malice and without justification or excuse and reminded the jury, "if you do not so find, or have a reasonable doubt as to one or more of these things" that it would not return a verdict of guilty of second degree murder. (Emphasis supplied.) After the jury returned for further instructions it was again made clear, this time by negative implication, that the State had the burden of proof on malice. It was also explained that the self-defense instructions given on second degree murder applied also to manslaughter:

> "In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I will be glad to define it for you again if you want me to. Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one . . . . Well, I will define malice for you. The difference between second degree murder and manslaughter, as I

told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. (Emphasis supplied.)

The jury was told further that the presumptions of malice and unlawfulness necessarily result in a finding of guilt of second degree murder only if nothing else appears. The effect of this statement was to impose upon the defendant a burden to go forward with, or produce, some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. There is no suggestion in Mullaney that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Nothing in this opinion is intended to affect that requirement." Mullaney v. Wilbur, supra, n. 28.

On the other hand if there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the presumptions of malice and unlawfulness, respectively, under the jury instructions given here need not disappear but could be weighed against this evidence. There is nothing constitutionally infirm about this. In United States v. Barnes, supra, n. 9, the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory' . . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

In Maine, where heat of passion was the essential difference between murder and manslaughter, the burden was never placed on the State at any time to prove its nonexistence by any standard of proof; rather the defendant was required to prove its existence by a "fair preponderance of the evidence." Under the instructions here given the burden to prove malice and unlawfulness beyond a reasonable doubt was clearly and repeatedly placed on the State.

From the foregoing therefore, it is apparent that in the past, the North Carolina Court used "presumption of malice" from the

intentional use of a deadly weapon in the sense of an inference rather than a true presumption of law. What the Court was really saying was when the prosecution proved beyond a reasonable doubt that the accused proximately caused the death by the intentional use of a deadly weapon the fact-finder would be justified in inferring an intent to kill on the part of the accused. As noted in Evans v. State, supra, a perceptive and exhaustive opinion:

> "Some mislabled 'presumptions' have turned out, upon careful examination, to be nothing more than permitted inferences of fact." 349 A. 2d at 338.
>
> Later, it was noted:
>
> "The only inference of any significance in our homicide law is the permitted inference of an intent to kill or of an intent to do grievous bodily harm from the directing of a deadly weapon at a vital part of the human anatomy or from some similar use of deadly force. The earlier case law sometimes spoke of the use of a deadly weapon as giving rise to a 'presumption of malice'. In Lindsay v. State, (8 Md. App. 109, 258 A. 2d 760) however, Chief Judge Orth stole a march on Mullaney v. Wilbur and strove mightly to refine the appellate vocabulary of Maryland and to bring it into the 20th century. He meticulously explained that we do not 'presume' anything from the use of deadly force; we are only permitted (but not required) to draw inferences from such use of deadly force. He further pointed out that this permitted inference of fact passes full constitutional muster under Leary v. United States, (395 U.S. 6 (1969)). We reaffirm and add that it thereby also passes constitutional muster according to Mullaney v. Wilbur and Winship." 349 A. 2d at page 339.

The reasoning of the Maryland Court applies with full force to North Carolina. The North Carolina Court, in as recent a decision as State v. Williams, 288 N.C. 680, ___ S.E. 2d ___ (1975), was still talking in terms of a "presumptions" from the intentional use of a deadly weapon when, in actuality, what it meant was an "inference" from this evidence. This, as argued above, is a far cry from a true presumption in law, such as existed in Maine and Maryland, which shifts the burden of persuasion to the defendant to negate an element of the crime. When this misplaced and misnamed "presumption" is viewed in its true nature, North Carolina law contains no presumptions which shift any burden of persuasion to the defendant. This being so, any similarity between the North Carolina law and either the Maine law condemned in Mullaney

and the Maryland law found wanting in Evans ends. The North Carolina law, however inartfully articulated by its Court over the years, is not constitutionally infirm by the due process standards set forth in Winship and Mullaney.

II.

THE SUPREME COURT OF NORTH CAROLINA ERRONEOUSLY APPLIED THE MULLANEY V. WILBUR DOCTRINE TO THE INSTRUCTIONS UNDER ATTACK.

In the event this Court decides to grant the Petition for Certiorari to consider the question of retroactivity or the use of evidentiary presumptions of malice or unlawfullness arising out of the intentional use of a deadly weapon, the State of North Carolina would ask this Court to consider the question of whether its Supreme Court was correct in its conclusions that the doctrine of Mullaney v. Wilbur invalidated the longstanding North Carolina jury instructions as to sudden provocation on heat of passion and self-defense. It appears to the Respondent that its Court, in an overabundance of caution to follow the commands of this Court, may have misinterpreted and thereby misapplied the doctrine announced in Mullaney. Because this Court is the only body which can make authoritative interpretations of its decisions, the interpretation of the exact scope of Mullaney to jury instructions markedly different from those considered in Maine may, consequently, have been in error. It is the position of the Respondent that its Supreme Court was in error.

There is nothing improper in the Respondent taking this position. In California v. Greene, 399 U.S. 149(1970), the State of California was successful in getting an erroneous decision of its Supreme Court applying federal constitutional provisions embodied in the fifth amendment corrected. In Michigan v. Payne, 412 U.S. 47(1973), an erroneous decision of the Michigan Supreme Court applying the doctrine of North Carolina v. Pearce, 395 U.S. 711 (1969), retroactively was reversed when it was ultimately held that Pearce was not to be applied retroactively. Accordingly, all the Respondent is asking is that this Court look at the jury instructions under attack as well as the prior North Carolina Law which gave rise to these instructions to see if they

comport with the new due process standards recently announced. The Respondent feels they do and thus disagrees with its Court's decision.

The reasons for this disagreement are adequately covered in Argument I preceeding and, other than in summary fashion, they will not be repeated here. The Respondent feels that its rules of proof "to the satisfaction" of the jury do not create a constitutionally significant shift of the burden of persuasion to defendants in homicide prosecutions. Further, the Respondent feels the evidentiary presumptions or inferences as to malice and unlawfullness long used in North Carolina where there is an intentional use of a deadly weapon are not invalidated by Mullaney. For this reason, therefore, the Respondent most urgently asks this Court to undertake an examination of North Carolina's rules of it should decide to grant certiorari.

SUMMARY AND CONCLUSION

The position of the Respondent, State of North Carolina,is that the conclusions of its Court of Appeals and Supreme Court that no error prejudicial to the Petitioner in the conduct of his trial has been shown by the record of the proceedings is correct. Accordingly, the Respondent argues that his petition should not be granted. The petitioner, at no stage of the proceedings, has denied that he fired a pistol at the deceased. His consistent contention has been that his actions were not unlawful because he acted in self-defense. Unfortunately, because there were no witnesses to the shooting, his uncorroborated story has been pitted against many facts and circumstances which tended to show a situation contrary to his version. He has had a full opportunity to tell his story to an unquestioned and unquestionably impartial jury which chose to reject his version. Because of this, the Respondent submits substantial justice has been done and, therefore, the conclusion reached by the jury, who had full opportunity to observe the demeanor of all witnesses, should not be disturbed.
It is the further position of the Respondent that the long established

rules of law in North Carolina as to the burden of proof in homicide cases where issues of sudden provocation in heat of passion and self-defense are present are constitutionally sound and consistent with due process. Consequently, its Supreme Court was well justified in its conclusion that these rules should not be changed as to those cases in which the trial had been completed prior to the date of the announcement of Mullaney.

The Respondent has no quarrel with the commendable caution of its Supreme Court in striking out of its law any portions thereof which might be remotely or arguably in conflict with this Court's command in Mullaney and with its admonition to all trial judges who conduct trials after the date of Mullaney. This part of its Court's opinion is beyond doubt free from any error.

Finally, the Respondent, although steadfastly believing that further appellate review of Petitioners trial is neither desirable or justified, urges that in the event this Court decides to grant certiorari, that it consider whether the Supreme Court of North Carolina was in error by applying the Mullaney standards even prospectively to North Carolina. The Respondent urges, as heretofore developed, that its law is and always has been in full accord with the due process standards announced in Mullaney.

Respectrully submitted, this the 15th day of June, 1976.

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